public health and welfare with an adequate margin of safety. 42 U.S.C. §7409.[4] The states, in turn, develop State Implementation Plans ("SIPs"), setting source-by-source emissions limits to meet the NAAQS. *Id.* §7410.[5] These limits are premised on a permitted source operating at its maximum emitting capacity (*i.e.*, all year at maximum production capacity) without exceeding the NAAQS.[6]

**B. New Source Programs.**

***1. The New Source Performance Standards ("NSPS") program did not regulate existing emissions capacity.***

The 1970 Amendments also directed EPA to issue NSPS to minimize the impact of adding new emissions capacity.[7] Congress debated whether to subject existing emissions capacity to NSPS, but chose not to do so.[8] Thus, NSPS apply only to new sources—*i.e.*, newly-constructed emission units or "modifications" of existing units. *Id.* §7411(a)(2) ("new source" is one on which "construction or modification ...is commenced after" a given date). Modification is defined as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *Id.*

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[4] *See also Train v. NRDC*, 421 U.S. 60, 66-67 (1975).

[5] *See also Union Elec. Co. v. EPA*, 427 U.S. 246, 249-50 (1976).

[6] *See, e.g., Cleveland Elec. Illuminating Co. v. EPA*, 572 F.2d 1150, 1160 (6th Cir. 1978) ("The model [used to calculate required SIP limits] is operated on the assumption that the plants concerned operate 24 hours a day at full capacity and predictions are made for every day of the year.").

[7] "The legislative history of §111 [NSPS] ... reveals that Congress was most concerned that new plants—new sources of pollution—would have to be controlled to the greatest degree practicable if the national goal of a cleaner environment was to be achieved." *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 434 n.14 (D.C. Cir. 1973).

[8] *See* S. Rep. No. 91-1196, at 15-17 (1970), *reprinted in* Legal Compilation: Statutes and Legislative History, EPA (1973) (noting the high cost and difficulty of installing new control technologies on existing sources).

§7411(a)(4).

The NSPS regulatory definition of "modification" promulgated in 1971 tracked the statutory definition almost verbatim. 36 Fed. Reg. 24,876, 24,877 (Dec. 23, 1971). The rules further specified that "[r]outine maintenance, repair, and replacement shall not be considered physical changes," and a "change in the method of operation" does not include: (1) an "increase in the production rate ... [within the facility's] operating design capacity;" (2) an "increase in hours of operation;" or (3) the "use of an alternative fuel" that the facility was "designed to accommodate" before a given date. *Id.* (codifying 40 C.F.R. §60.2(h)). Thus, under these rules, only activities that increase a facility's design emitting capacity triggered NSPS.[9]

In 1975, EPA revised the NSPS rules to "clarify the phrase ... 'increases the amount of any air pollutant'" in the statutory and general regulatory (40 C.F.R. §60.2) definition of "modification." EPA stated this phrase refers to an increase "in emission rate," which the regulations "expressed as kg/hr." 40 Fed. Reg. 58,416, 58,419 (Dec. 16, 1975). As EPA explained, the use of this measurement unit clarified that the modification rule would be sensitive to "increased production capacity and to overall increases in total emissions to the atmosphere" (*i.e.*, to *new* capacity to emit), while "*automatically* allow[ing] increases in operating hours as intended by one of the existing exemptions under 40 C.F.R. §60.2(h)." 39 Fed. Reg. 36,946, 36,947 (Oct. 15, 1974) (emphasis added). Thus, EPA recognized, the existing exclusion in the NSPS rule for increased "hours of operation" by definition meant that only activity that increased the facility's existing *hourly* emissions rate—*i.e.*, its actual emitting capacity—is a "modification" under §111 of the Act.

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[9] The NSPS provisions were "designed to prevent new air pollution problems." *National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 783 (D.C. Cir. 1976); *see also* H.R. Rep. No. 1146, at 3 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5358.

### 2. *The New Source Review ("NSR") programs adopted the NSPS concept of "modification."*

#### a. Congress adopted the NSPS "modification" concept into the 1977 statutory NSR program.

In 1977, Congress further amended the CAA by enacting two more new source programs: the PSD and Non-Attainment New Source Review (NNSR) programs.[10] Basically, the 1977 Amendments codified a then-existing 1974 *regulatory* PSD program.[11] In doing so, Congress specifically considered the various provisions of the regulatory program and decided to "tighten[]" some of them. *See Ala. Power*, 636 F.2d at 349-50. Congress did *not*, however, change the applicability provisions of these regulations (which were the same as NSPS); it simply incorporated the NSPS definition of modification into the NSR definition of modification.

Thus, Congress defined "modification" under NNSR to "mean the same as the term 'modification' *as used* in section 7411(a)(4) [NSPS]." 42 U.S.C. §7501(4) (emphasis added).

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[10] PSD applies to all new emissions capacity in areas meeting the NAAQS (attainment areas), while NNSR applies to all new emissions capacity in areas not meeting the NAAQS (non-attainment areas). Here, EPA had alleged violations of PSD because the areas in North and South Carolina where Duke's plants operate were in attainment for all relevant pollutants during the periods of interest. This brief refers to the NSPS, PSD, and NNSR programs collectively as the "New Source programs." It refers to the PSD and NNSR programs together as "NSR."

[11] 42 U.S.C. §7478(a) ("Until such time as an applicable implementation plan is in effect ... which ... meets the requirements of this part ... applicable regulations under this chapter prior to August 7, 1977 shall remain in effect ... except as otherwise provided in subsection (b)"). Prior to Congress' amending the Act to include NSR requirements, EPA—prompted by a court's preliminary injunction—had promulgated rules adopting a PSD program. *See generally Ala. Power Co. v. Costle*, 636 F.2d 323, 346-49 (D.C. Cir. 1979) (describing the statutory and regulatory history of PSD). EPA specified that the "general definition of modified source" in its PSD rules was meant to be "consistent with the definition used in Part 60 [*i.e.*, NSPS]." 39 Fed. Reg. 42,510, 42,513 (Dec. 5, 1974).

As originally enacted, the PSD program referred only to the "construction" of major sources, and not to "modification" as did the NNSR program. Three months later, Congress fixed this oversight by adding "modification" as defined under NSPS to the "construction" activity subject to PSD. *See id.* §7479(2)(C) ("The term 'construction' ... includes the modification (as defined in section 7411(a) [NSPS] ...).").

In support of this "technical amendment," Congress explained that it intended to incorporate the "usage" of the NSPS definition of "modification."[12] EPA has repeatedly acknowledged that "[t]he phrase 'usage in other parts of the Act' ... refers, not only to section 111(a)(4), but also to the EPA regulations implementing section 111 that were in effect at that time."[13]

b. The 1980 PSD rules incorporated the NSPS concept of "modification."

EPA's 1978 PSD rules defined "major modification" as a "physical change [or] change in the method of operation" which "increases the *potential emission rate*" (in tons per year) of regulated pollutants from a "major stationary source."

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[12] 123 Cong.Rec. 36331 (1977) (technical amendments "[i]mplement[] conference agreement to cover 'modification' as well as 'construction' by defining 'construction' in Part C to conform to usage in other parts of the Act."). Congress emphasized it was "not the purpose of these [technical] amendments to re-open substantive issues in the [CAA]." 123 Cong.Rec. 36252 (1977). Congress had resolved the substantive issue of the applicability of the new statutory NSR programs to existing units by leaving the applicability provisions of the 1974 PSD regulations unchanged and providing that "modification" under NSR is the same "as used" under the pre-existing NSPS program.

[13] 49 Fed. Reg. 43,211, 43,213 (Oct. 26, 1984) ; see *also* 43 Fed. Reg. 26,380, 26,394 (Jun. 19, 1978); 68 Fed. Reg. 61,248, 61,269 (Oct. 27, 2003) (1977 CAA "refer[red] to our preexisting rules interpreting the term 'modification' in the NSPS context."); Pet. App. 35a-36a. *See also Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) ("Congress' *repetition* of a *well-established term* carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.") (emphasis added).

43 Fed. Reg. at 26,403 (emphasis added). Because these rules assumed the same "potential" hours of operation before and after the change, only a change that increased an existing unit's hourly emissions rate (*i.e.*, an NSPS "modification") could trigger NSR. Virtually all of the 1978 rules, except that aspect of the definition of "major modification," were challenged. *See Ala. Power Co.*, 636 F.2d 323. In implementing the court's remand requiring a "bubble" concept for defining "source" under PSD,[14] the final 1980 rules defined "major modification" as "any physical [or operational] change ... of a major stationary source that would result in a significant net emissions increase" in the source's "actual emissions" (in tons per year).[15]

For there to be a "major modification," the 1980 PSD rules require that an increase in "actual emissions" in tons per year result from the proposed change. For existing units that have begun normal operations, "actual emissions" is defined by reference to "actual operating hours [and] production rate" for a historic (pre-change) period "which is representative of normal source operation." *Id.* §51.166(b)(21)(ii). That is, for these units, only one period of "representative" conditions is required to characterize those "normal source operations." Accordingly, post-project "actual emissions" must be calculated using the same "representative" conditions of operation (*i.e.*, hours of operation) that existed before the change. This is confirmed by the definition of "modification," which states that the "increase" in actual emissions must result *from* the "physical [or operational] change," which by definition excludes "[a]n increase in the hours of operation or

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[14] Under the "bubble" concept, the "source" subject to NSR is an entire plant, which may include several "emissions units." By contrast, each individual emissions unit is a separate "source" under NSPS.

[15] 40 C.F.R. §§51.166(b)(2)(i), (b)(3)(i), (b)(21). The NSR rules applicable here are the PSD rules adopted in the state SIPs, as approved by EPA. The applicability provisions of the state rules are identical to the federal 1980 PSD rules, 40 C.F.R. §51.166 (1987). All references to the 1980 PSD rules are to the 1987 C.F.R., except where otherwise noted.

in the production rate" (unless restricted by permit). *Id.* §51.166(b)(2)(iii)(f) (emphasis added).[16] Thus, as under all of the prior modification rules, a change at an existing unit would result in an increase in "actual emissions" *only* if it first increases the unit's hourly emissions rate—*i.e.*, *only* if it is a "modification" under NSPS, 42 U.S.C. §7411(a)(4).[17]

By contrast, for units that have *not* begun normal operations (*e.g.*, new units or completely reconstructed units), the 1980 rules require a different assumption for *post*-change operating hours: since the unit has no operating history, one must assume the full "potential to emit" (8,760 hours, unless hours were limited). *Id.* §51.166(b)(21)(iv). This *different* test for units that have not begun "normal operation" is known as the "actual-to-potential" test.

### *3. Implementation of the PSD program.*

#### a. EPA's contemporaneous interpretation of "modification" in the PSD rules is consistent with the NSPS definition of "modification."

Shortly after finalizing the 1980 PSD rules, EPA confirmed that the definition of "net emissions increase" meant just what it said. *See* Pet. App. 58a-59a. In 1981, EPA confirmed that "PSD applicability [at a previously operating unit] is determined by evaluating any change in [hourly] emissions rates caused by" the physical or operational change under review. Letter of Reich, EPA, to Gill, General Elec. (June 24, 1981) ("GE Determination"), CA App. 234-41. Absent a change in the per-hour emission rate, EPA concluded, actual emissions "could increase only if there is an *increase in the*

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[16] The 1980 rules' preamble explains, "The *first step* ... is to determine whether the physical or operational change in question would *itself* result in an increase in 'actual emissions.'" 45 Fed. Reg. 52,676, 52,698 (Aug. 7, 1980) (emphasis added). "[T]hose phrases do not encompass ... any increase in the hours or rate of operation of a source, so long as the increase would require no change in any ... permit condition." *Id.*

[17] Pet. App. 58a-60a; *see WEPCo*, 893 F.2d at 918 n.14.

*production rate or hours of operation, both of which are specifically exempt from PSD review.*" *Id.* (*citing* 40 C.F.R. §52.21(b)(2)(iii)(f)).[18] Therefore, the unit's production rate and hours of operation are kept constant in calculating an "emission increase" under the "actual-to-actual" test required by the 1980 PSD rules. *See* 40 C.F.R. §51.166(b)(2)(iii)(f).[19]

b. The *WEPCo* court rejected EPA's attempt to reinterpret the 1980 rules.

Only once in the 30-year history of new source programs before EPA's new "enforcement initiative" against coal-fired utilities did EPA determine that a power plant repair and replacement project would trigger PSD and NSPS.[20] In 1988, Wisconsin Electric Power Company ("WEPCo") proposed a "renovation" project at its Port Washington Plant, which had operated over 10 years at a maximum achievable *capacity* well below its original capacity. Mem. from Kee, EPA Region V, to Emison, EPA (Mar. 25, 1988), CA App. 256-57.[21] EPA found the replacements WEPCo proposed to increase "[p]lantwide capacity ... about 40 percent above current levels to 400 megawatts," *id.*, "highly unusual, if not unprecedented." Initial WEPCo Determination, CA App. 807. Given both the magnitude and uniqueness of these replacements, EPA determined WEPCo's project was not

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[18] This determination was consistent with a previous one dated January 22, 1981. Letter of Reich, EPA, to Whitmore, EPA Region VII (Jan. 22, 1981), CA App. 242-43 ("Cargill Determination"). In both determinations, physical and operational changes were being made to the units; these were not mere stand-alone increases in operating hours.

[19] 40 C.F.R. §51.166(b)(2)(iii)(f) is identical to §52.21(b)(2)(iii)(f) that the GE Determination cites. *See also* Pet. App. 41a n.11.

[20] *See* Mem. from Clay, EPA, to Kee, EPA Region V (Sept. 9, 1988) ("Initial WEPCo Determination"), CA App. 804-15; Letter from Thomas, EPA Adm'r, to Boston, WEPCo (Oct. 14, 1988), CA App. 248-55; Letter from Clay, EPA, to Boston, WEPCo (Feb. 15, 1989), CA App. 830-41.

[21] Several years before the proposed project, the WEPCo units had been formally "derated" from their full capacity of 80 MW each to operating capacities ranging from 49 MW to 78 MW. CA App. 256.

"routine maintenance, repair and replacement" within the exclusion provided under the NSPS rules and incorporated into the NSR rules. *Id.* The Seventh Circuit upheld that determination. *WEPCo*, 893 F.2d at 910-13.

Regarding emissions increase, EPA found an NSPS emissions increase at three WEPCo units. EPA, however, also found a PSD emissions increase at all five units, by comparing their actual annual emissions during a pre-repair representative period to their theoretical, maximum annual emissions (*i.e.*, "potential to emit"), derived by multiplying the units' maximum emissions rates by a full year (8,760 hours)—the "actual-to-potential" test.

The court upheld EPA's NSPS finding, but reversed EPA's PSD determination. Under the rules, the "potential to emit" concept plainly applies *only* to a "unit which has not begun normal operations." 40 C.F.R. §51.166(b)(21)(iv). Refusing to "defer to agency interpretations that ... appear to assume what they seek to prove," the court rejected EPA's circular reasoning—that, "in order to demonstrate that [WEPCo's] like-kind replacement project constitutes a modification," EPA "applies the potential to emit concept (to show an increase in emissions)," and, "in order to apply the potential to emit concept to like-kind replacement, the EPA assumes that the plant is a 'modified' unit." *WEPCo*, 893 F.2d at 917.

On remand, the court ordered EPA to determine "whether the renovated plant would cause a significant net emissions increase if it were operated *under present hours and conditions*," *id.* at 918 n.14 (emphasis added)—*i.e.*, calculate post-project emissions on the basis of the *restored* hourly emissions rate of the repaired plant under the actual hours and conditions of operation during the representative *baseline* period. By holding pre- and post-project hours and conditions constant at a level representative of normal operations, any "net emissions increase" could be due only to an increase in the units' hourly rates, not a result of more hours of operation. Thus, the court confirmed the rules' actual-to-actual emissions

test promulgated in 1980 and applied by EPA in 1981.[22]

c. EPA ignored the court's remand instructions in settling *WEPCo*.

On remand, EPA was precluded from applying the actual-to-potential test for the WEPCo units that had "begun normal operations."[23] But EPA refused to follow the court's remand instructions—that EPA determine on the basis of "present hours and conditions" whether WEPCo's project would result in an annual emissions increase—summarily dismissing them as "incorrect."[24] Instead, for settlement purposes and *with no reference to the regulatory language whatsoever*, EPA devised an emissions calculation methodology comparing the units' representative baseline annual emissions (*i.e.*, pre-project emissions) to their "estimated future actual emissions." Remand WEPCo Determination, CA App. 271-72. In the Initial WEPCo Determination, when WEPCo suggested such a test as an alternative argument, EPA categorically responded: "The [1980] PSD regulations provide no support for" an actual-to-projected-actual test. CA App. 810 n.4.

In the 1992 "WEPCo Rule," EPA promulgated a rule containing the new actual-to-projected-actual methodology for which the 1980 rules "provide no support." Significantly, EPA did not change the "base" 1980 rules governing emissions increase, and EPA made this new 1992 "actual-to-

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[22] After *WEPCo*, EPA abandoned its re-interpretation of the rule that the Seventh Circuit had rejected, explaining that "[a]t least for changes that are 'like kind replacements,' 'normal operations' have begun, and the *actual-to-potential test is impermissible*." 57 Fed. Reg. 32,314, 32,317 (Jul. 21, 1992) (emphasis added). Yet, here, EPA returned in its summary judgment papers to this discredited interpretation, only to abandon it again at the summary judgment hearing. *See* Pet. App. 58a n.17.

[23] Letter from Rosenberg, EPA, to Boston, WEPCo (Jun. 8, 1990) ("Remand WEPCo Determination"), CA App. 265-78.

[24] *Id.* at 270. Although EPA asked for an extension of time for filing a motion for clarification or reconsideration of the court's remand, *see* Foote Affidavit in *WEPCo* (CA App. 279-82), it never filed it, choosing instead simply to ignore the court's clear instructions. *See also* Pet. App. 70a.

projected-actual" test available only to utilities that elect to undertake additional reporting. 40 C.F.R. §§51.166(b)(21)(v) & (b)(32) (1993).[25] Otherwise, the activity would be evaluated using the emissions increase test of the 1980 rules.[26]

***4. EPA Reverses Course In 1999.***

Throughout the last three decades, the utility industry's maintenance practices—including component replacements sometimes referred to as "life extension"—were a matter of public knowledge. Before 1999, except for the unusual and unprecedented WEPCo project, no federal or state agency, or any environmental group for that matter, ever suggested that such projects triggered NSR. Indeed, as the district court recounted at length, EPA was fully aware of "life extension" practices as early as the 1980s. Pet. App. 50a n.13. EPA-directed studies, which were provided to Congress and formed the basis of the Acid Rain Program enacted in the 1990 CAA Amendments, assumed that existing coal-fired power plants would continue to operate at original capacity for 55 to 65 years on average, being "refurbished" around age 30, without being subject to New Source programs. *Id.*[27] After WEPCo, and throughout the 1990s, EPA continuously reaffirmed its

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[25] Thus, the WEPCo Rule's actual-to-projected-actual test may be used by electing utilities, even where a project increases an existing unit's maximum hourly emissions rate. *See* 57 Fed. Reg. at 32,324-26 (explaining the new test may be applied to *any* change at a utility, except the construction of a "greenfield" unit or the replacement of an existing one).

[26] Thus, after 1992, the NSR rules provided three emissions increase tests: (i) "actual-to-actual" for units that have begun normal operations; (ii) "actual-to-potential" test for units that have *not* begun normal operations; and (iii) "actual-to-projected actual," which can be used by certain operating utilities, provided they submit necessary reports. Recently, EPA promulgated new rules rewriting the NSR emissions increase provisions. *See* 67 Fed. Reg. 80,186 (Dec. 31, 2002). The parties agree this case is governed by the 1980 rules.

[27] *See also* "1989 EPA Base Case Forecasts" (ICF for EPA), Appendix C, CA App. 364-77; Letter from K. Schweers, ICF, to R. Beck, Edison Elec. Institute (July 26, 1989), CA App. 378-79.

position, telling industry and Congress most power plant projects and activities would not trigger NSR. *Id.* at 51a-52a.

Starting in 1999, EPA reversed course. It filed nine actions against midwestern and southern coal-fired utilities, including Duke Energy, and an administrative action against the Tennessee Valley Authority.[28] In the enforcement initiative, EPA alleged near universal non-compliance with NSR, claiming hundreds of utility repair and replacement projects over the past twenty years violated NSR.[29] According to EPA and Petitioners, Duke Energy misunderstood (or misapplied) the 1980 PSD rules for the past quarter of a century (and EPA, the States, and organizations such as petitioners were all asleep at the switch). Duke Energy defended on the ground that EPA was seeking in this enforcement action to re-write and apply, retroactively, new and unlawful interpretations of the 1980 PSD rules.

## II. FACTUAL AND PROCEDURAL BACKGROUND

The court of appeals' and district court's decisions and orders state the relevant facts. *See* Pet. App. 5a-7a; 23a-31a, 50a-53a, 60a-62a; 87a-95a. These facts are summarized briefly below.

Duke Energy has provided electricity to North and South Carolina since the early 1900s. Its system includes nuclear, hydroelectric, gas-fired combustion turbine, and coal-fired plants. Duke Energy operates thirty coal-fired units at eight plants in the Carolinas. *Id.* at 22a, 24a. Virtually all of Duke Energy's coal-fired units are at issue here.

Each coal-fired unit consists of three primary components: the boiler, the steam turbine, and the generator. The boilers are large, building-like structures six to twenty stories tall, containing thousands of steel tubes in which water is heated to superheated steam with temperatures in excess of 900°F. In general, a boiler consists of collections of tube assemblies. *Id.*

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[28] *See* Dist. Ct. App. DX48-55 (complaints filed by United States).

[29] *See* CA App. 493-511 (projects alleged to violate NSR in all actions).

at 24a. Because these tubes are subject to corrosion and extreme pressures and temperatures, they periodically fail and must be repaired or replaced so that the utility can meet its statutory duty to provide the public a reliable electricity supply. *See, e.g.*, N.C.GEN.STAT. §62-2.

Here, EPA alleged that Duke Energy modified generating units at all eight of its coal-fired power plants without obtaining necessary PSD pre-construction permits. The earliest of the 29 targeted projects took place in 1988. Most of the projects consisted of replacing one or more of four boiler tube assemblies that had deteriorated due to normal wear and tear (*i.e.*, economizers, portions of waterwalls, superheaters and reheaters). *See* Pet. App. 24a-25a.

Most of the projects occurred during regularly-scheduled planned outages. During such outages, maintenance, repair and replacement tasks are performed inside the unit that cannot be performed during operation. These outages occur every 48-84 months, depending upon the unit's condition and load requirements of the system. Typically, outages are planned for spring or fall when electricity demand is lower, and they can last from several weeks to months. CA App. 518¶10.

The other projects at issue occurred during periods of "extended cold shutdown" ("ECS")—when the units were not needed to meet demand, but during which Duke Energy "made definitive plans for preserving and conditioning the units so that they could be returned to service when demand dictated." Pet. App. 27a-28a.

Some time after the units were placed in ECS, Duke Energy developed an enhanced maintenance program, the "Plant Modernization Program" ("PMP"). While separate projects were consolidated under PMP, the work was similar in nature to the boiler and turbine component repair and replacements commonly undertaken during regularly scheduled outages by Duke Energy (and industry generally). CA App. 559¶9.

During this period, Duke Energy was in frequent contact with state regulators and told them about the work to be done at its units. State regulators, who were responsible for

determining CAA compliance, regularly inspected Duke Energy's plants while the units were in ECS and PMP, and knew of the work being performed on them. The inspection reports uniformly certified the plants were *in compliance with all applicable air quality regulations*. CA App. 623-79 (collecting reports). For example, in the course of renewing the state permits for Duke Energy's Buck plant in 1987, the North Carolina regulator wrote that "Unit Nos. 3, 4 and 5 are currently in the plant modernization project (PMP) until 1989," and he explicitly noted "PSD, NSR, NSPS, and NESHAP do not apply." CA App. 654.

EPA was well aware of industry repair and replacement practices, including "the utility industry practice of engaging in life extension projects." Pet. App. 50a n.13. Indeed, EPA knew of specific Duke Energy life extension projects, and raised no questions about them. *See id.* In the last two decades, EPA conducted thousands of utility plant inspections.[30] EPA has visited plants *while* boiler component replacements were ongoing, but EPA never cited them even as potential violations of NSR. *Id.*

Although Duke Energy's existing units are not regulated as "new" sources, they are extensively regulated under the CAA. They have emission limits set to protect public health (with an adequate margin of safety) under the NAAQS, based on the conservative assumption that the units would operate at maximum capacity every hour in the year. *Supra* 3. In addition, they are regulated under (1) the CAA "Acid Rain" Program, which requires existing utilities to make further reductions in sulfur dioxide ($SO_2$) and nitrogen oxides ($NO_x$) emissions; (2) the "$NO_x$ SIP Call Program" and the Clean Air Interstate Rule, which require additional reductions in utility $SO_2$ and $NO_x$ emissions in the eastern half of the U.S., *see Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000); 70 Fed.

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[30] *See, e.g.*, EPA, *Profile of the Fossil Fuel Electric Power Generation Industry*, 123, 125 (Sep. 1997) http://www.epa.gov/compliance/resources/publications/assistance/sectors/notebooks/fossil.html.

Reg. 25,162 (May 12, 2005); and (3) North Carolina's 2002 Clean Smokestacks law, one of the nation's most stringent air emission control laws, N.C.GEN.STAT. §143-215.107D. Duke Energy's program to meet this new state law alone involves the installation of additional controls on most of its units at an expected cost of $1.5 billion. CA App. 523-24 ¶¶8-11.

None of Duke Energy's units have violated *any* of the emission limits or control requirements under these CAA and state programs. The parties have stipulated that none of the projects increased the maximum achievable hourly emission rate of *any* of the units. Pet. App. 88a-89a. That is, none of the projects at issue created *any* new or unregulated emissions at any unit. Rather, Plaintiffs' allegations below were "based *solely* on their contention that the projects would have been projected to result in increased *utilization* of the units at issue." *Id.* (emphasis added).[31]

On cross-motions for summary judgment, the court had before it three different interpretations of "actual emissions increase" under the 1980 PSD rules. Each of these interpretations had been advanced by EPA at one point in the regulatory history: (1) EPA's contemporaneous interpretation of the rules providing an "actual-to-actual" test (*see* Pet. App. 58a-60a); (2) an "actual-to-potential" interpretation that EPA announced as the basis for this enforcement action, but then abandoned later in the district court (*see id.* at 58a n.17); and (3) an "actual-to-projected-actual" interpretation, which EPA then asserted in this action. The court upheld EPA's actual-to-actual interpretation, finding it compelled by the rules' plain language,[32] and consistent with EPA's historic interpretation of the rules, the statute, and precedent. *Id.* at 58a-72a.

After reviewing the two interpretations of the rules that the

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[31] Duke Energy disputes this contention, and believes none of the projects resulted in an emissions increase, even under Plaintiffs' theories.

[32] Pet. App. 60a (also rejecting EPA's attempt "'under the guise of interpreting a regulation, to create *de facto* a new regulation.'") (quoting *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)); *id.* at 70a (EPA's enforcement interpretation is "[n]owhere in the regulations.").

parties pressed on appeal, the Fourth Circuit agreed with EPA that the "critical first 'question at issue'" was "whether the EPA 'can interpret the statutory term "modification" under PSD differently from how EPA interpreted that term' in the NSPS." Pet. App. 10a-11a (quoting U.S. Brief at 1). Because the answer was no, and Plaintiffs' litigation interpretation of the 1980 PSD rules rendered those rules inconsistent with the NSPS rules defining "modification," the unanimous panel (Judges Motz, Luttig, and Wilson—by designation) concluded that interpretation must be rejected in favor of EPA's contemporaneous interpretation that makes the two regulatory programs consistent, as Congress intended.

## REASONS FOR DENYING THE WRIT

### I. THE FOURTH CIRCUIT'S CONSTRUCTION OF THE RULES AND THE STATUTE IS NOT INCONSISTENT WITH THOSE OF OTHER COURTS OF APPEALS OR THIS COURT.

The Fourth Circuit construed in this case the 1980 PSD rules, as applied to Duke Energy's existing units—units that had long ago "begun normal operations." The court rejected the Plaintiff's litigation position, and affirmed instead EPA's own contemporaneous interpretation of these rules (*see supra* 8-9). That construction is not contrary to any other court of appeals' construction of these rules.

*Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989) did not address the 1980 rules for units that *have* begun normal operations. The very first sentence of that opinion explains, the "Company wishes to build a *new* cement kiln, replacing older kilns ...." *Id.* at 293 (emphasis added). A *new* kiln is a unit that has *not* begun normal operations, and for which the actual-to-potential test plainly applies under the 1980 rules. As then-Judge Breyer observed, "[T]here is no logical contradiction in rules that, on the one hand, permit firms using *existing* capacity simply to increase their output and, on the other, use the potential output of *new* capacity as a

basis for calculating an increase in emissions levels." *Id.* at 298 (underlines added). But, that is neither disputed by the Fourth Circuit nor contrary to its construction of the 1980 rules for units that have begun normal operations. *Cf. WEPCo*, 893 F.2d at 917 n.12 ("unlike the case at issue here, *Puerto Rican Cement* involved the construction of a *new* emissions unit at an existing source.") (underlines added).

The Seventh Circuit in *WEPCo* rejected EPA's attempt to interpret the rules as requiring an actual-to-potential test for units that had begun normal operations. *Id.* at 917. The court's remand instructions were clear: NSR is triggered for existing units that have begun normal operations where "the renovated plant would cause a significant net emissions increase *if it were operated under present hours and conditions*"—*i.e.*, if hours of operation were held constant. *Id.* at 918 n.14 (emphasis added). This is the actual-to-actual test applied by EPA in 1981, adopted by the district court, and affirmed by the Fourth Circuit. Indeed, given that the district court discussed *WEPCo* at length and *relied* on it in part to reach its construction of the 1980 rules, Pet. App. 67a-70a, Petitioners' argument that the decision below is contrary to *WEPCo* defies credulity.

Contrary to Petitioners' claim, nothing the D.C. Circuit said in *New York* conflicts with the Fourth Circuit's construction of the 1980 rules or the statute. The D.C. Circuit stated: "*We express no opinion* as to whether Congress intended to require that EPA use identical regulatory definitions of modification across the NSPS and NSR programs. *Cf.* [*Duke Energy*]." *New York*, 413 F.3d at 20 (emphasis added).

Despite this express acknowledgement, Petitioners strain to identify a conflict between *Duke Energy* and *New York*. They fail. *New York* principally addressed the lawfulness of the revised NSR rules promulgated by EPA in 2002, rules that were not at issue in this case and to which the Fourth Circuit did not speak at all. And while industry petitioners challenged EPA's contention in the preamble of the 2002 rule that, "[p]rior to today, the [1980 PSD] regulations applied ... an

actual-to-potential applicability test for all ... emissions units,"[33] the D.C. Circuit explicitly declined to reach that issue as well, finding it not ripe for review and best addressed in a more concrete factual setting. According to the court, "[i]f there are still pending applications of the 1980 rule in which EPA attempts to employ the disputed" interpretation, "judicial proceedings addressed to the application could solve the problem of any affected firm." *Id.* at 21. That is precisely what the Fourth Circuit did here. In short, the D.C. Circuit did not adopt *any* interpretation of the 1980 PSD rules, much less one in "conflict" with the court's decision here. It specifically left the debate over the meaning of the 1980 rules for resolution in the local circuits in the enforcement context.

Unable to find a conflict between the Fourth Circuit and other circuits on the actual issue before the court below (*i.e.*, the meaning of the rules), Petitioners claim the court's reasoning (*i.e.*, its application of statutory construction principles) presents such a conflict and is inconsistent with this Court's teachings on statutory construction. Petitioners are wrong.

Both courts below recognized that, in some circumstances, courts – indeed the Fourth Circuit itself – have agreed that EPA may define the same term differently under PSD and NSPS. *See* Pet. App. 16a-18a (discussing *PEPCo v. EPA*, 650 F.2d 509 (4th Cir. 1981) and *Northern Plains Res. Council v. EPA*, 645 F.2d 1349 (9th Cir. 1981)); Pet. App. 64a-67a (discussing *Alabama Power Co. v. Costle*, 636 F.2d 323, 401 (D.C.Cir. 1979) and *Northern Plains*). But they both explained that these courts' decisions turned on the fact that *Congress* had defined the terms at issue there ("source" in *PEPCO* and *Alabama Power*, and "commenced" in *Northern Plains*) *differently* under PSD than NSPS. Here, by contrast, Congress explicitly "linked the PSD definition of the term

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[33] *See* 67 Fed. Reg. at 80,199. Notably, that is an interpretation *different* from the actual-to-projected-actual interpretation EPA advanced simultaneously before the Fourth Circuit, further undercutting Petitioners' claim of the court's rejection of EPA's "authoritative" interpretation.

[modification] to its use in the NSPS provisions of the statute." Pet. App. 17a.

Nor did the Fourth Circuit ignore or misconstrue this Court's precedents. The court recognized that the task of statutory construction, as "holistic [an] endeavor"[34] as it may be, does not start with the court's (or the parties') conception of the "different purposes" of PSD and NSPS. Rather, that task starts with the language of the statute, *see e.g.*, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002), and the "different purposes of the NSPS and PSD programs cannot override [Congress'] mandate" as expressed in the statute.[35] Pet. App. 17a-18a; *cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.") (internal quotation and citation omitted).

The court below expressly recognized that while "the same word or phrase will generally be presumed to have the same meaning when used in different parts of the statute," that "'presumption ... relents' when there is 'a variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.'" Pet. App. 17a (quoting *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004)). Indeed, the court explained, decisions like *PEPCO*

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[34] *Koons Buick-Pontiac GMC v. Nigh*, 125 S. Ct. 560, 566-67 (2004), *quoted in* Pet. at 25.

[35] The district court explained that construing the PSD and NSPS modification rules congruently such that PSD is triggered only if there is NSPS modification activity at an existing *unit*, and then only if the *source-wide* annual emissions exceed a de minimis threshold, is not only consistent with the statutory text and intent but also effectuates the air quality purposes of PSD and thus "does not ignore the objectives of each program." Pet. App. 64a. As EPA agrees, the structure of the CAA makes clear that NSR is *not* an emission reduction program for existing sources, but rather a program to manage emissions "*growth*" (*i.e.*, new emissions). 69 Fed. Reg. 23,951, 23,986 (Apr. 30, 2004) (emphasis added).

and *Northern Plains* illustrate that principle. *Id.* But the court looked here, as it must, at the particular statutory language at issue, and it recognized that this language is different from the language construed in those cases, and must be given effect. It correctly concluded that, as this Court's decision in *Rowan* illustrates, it means something when Congress does not merely use the same term in different parts of the statute but also defines that single term in substantially the same way.[36] Pet. App. 11a-15a (discussing *Rowan Cos. v. United States*, 452 U.S. 247 (1981)). It defies common sense to conclude in such circumstances that despite Congress' identical statutory definition of that single term, the agency can give that term two different meanings. This reasoning is even stronger here.

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[36] Contrary to Petitioners' claim, the similarities between this case and *Rowan* are not only that Congress defined the same term the same way in two related parts of the statute. The *Rowan* Court noted that Congress chose the concept of "wages" as the "base" for measuring tax obligations, and used substantially the same language to define that concept—first in 1938 in FICA and FUTA, and then seven years later in the income tax withholding statute. Here, in 1970, Congress chose the concept of "modification" as the "base" for the type of activity that would transform an existing unit into a new one under NSPS. Seven years later, Congress made NSPS "modification" a trigger for pre-construction review of an existing unit under NSR. As *Rowan* held, "[i]n view of this sequence of consistency, the plain language of the statutes is strong evidence that Congress i[n]tended [the commonly defined term] to mean the same." 452 U.S. at 255. If there is a difference between *Rowan* and this case, it is that the plain language of the CAA, incorporating by reference the NSPS definition of modification into NSR, is "even stronger evidence" that Congress intended the term to be interpreted consistently. Pet. App. 14a.

The court also confirmed the legislative history "does not in any way suggest that Congress intended these identical statutory definitions to receive different interpretation," and "indicates congressional concern with the same sort of simplicity and consistency" evident in *Rowan*. *Id.* at 14a-15a. Finally, EPA's contemporaneous construction of the statute's PSD provisions is reflected in the 1978 rules, which defined "modification" under PSD congruently with NSPS, *see supra* 6-7, as did EPA's contemporaneous construction of the 1980 PSD rules, *see supra* 8-9. *Cf. Rowan*, 452 U.S. at 253 (discussing the agency's contemporaneous interpretation of the statute).

It defies common sense even more for petitioners to argue that by expressly stating in one part of the statute that a term means the same as in another part of the statute, Congress meant to authorize the agency to give that term *different* meanings.

The language of the statute is plain: for an activity at an existing unit to trigger PSD pre-construction review, it must be a "modification []as defined in section 7411." 42 U.S.C. §7479(2)(C). It is only under these circumstances that the Fourth Circuit held that if Congress' words in the statute are to be given effect, the presumption of uniform usage had become "effectively irrebutable." Pet. App. 18a.

Despite the Fourth Circuit's invitation, Petitioners have still failed to cite "a single case in which any court has held that identical statutory *definitions* can be interpreted differently by the agency charged with enforcement of the statute." Pet. App. 18a. *Gen. Dynamic Land Systems* and *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001), plainly do not fit that category. The fact is that only one other court was squarely presented with the particular statutory construction issue that the Fourth Circuit resolved.[37] That court flatly refused to engage the issue. *See New York*, 413 F.3d at 20. There is no conflict for this Court to resolve.

## II. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THIS CASE INVOLVES AN ISSUE THAT IS PERCOLATING IN THE LOWER COURTS.

Petitioners' claims that this case presents "recurring issues of national importance" are based primarily on their assertions that (1) the Fourth Circuit's decision is inconsistent with that of other circuits—an assertion that is clearly incorrect as discussed in section I, *supra*; and (2) that the Fourth Circuit

[37] It is not surprising that there is no precedent addressing the particular issue of statutory construction presented here. The language of the CAA, in which Congress explicitly and by cross-reference adopted a pre-existing definition of a term (here "modification") for a new program, is to our knowledge unique. This fact also counsels against certiorari in this case.

exceeded its jurisdiction—an assertion that is also clearly incorrect, as discussed in section III, *infra*.

Petitioners also note that EPA recently proposed a further amendment of the PSD rules that would adopt provisions consistent with the Fourth Circuit's construction of the rules. 70 Fed. Reg. 61,081 (Oct. 20, 2005). Contrary to Petitioners' suggestion, *see* Pet. at 27-29, EPA's recent action counsels against this Court granting certiorari and devoting its own scarce resources to reviewing the Fourth Circuit's decision. That is particularly true here because EPA's legal rationale for the proposed revision to the PSD rules does *not* rely on the Fourth Circuit's decision or reasoning (rather EPA reiterates its disagreement with it). *See* 70 Fed. Reg. at 61,098-101, 61,090. Nor does EPA's policy rationale for the proposed rule rely on the *Duke Energy* decision. *See id.* at 61,093-95.[38] EPA's proposed rule, once finalized, will rise or fall on EPA's legal and policy rationale for the rule, irrespective of whether this Court decides to review the *Duke Energy* decision.

Petitioners nevertheless insist the meaning of the 1980 PSD rules "will retain considerable importance" because these rules will continue governing numerous projects undertaken before their amendment. Pet. at 29 n.15. Even if that were true, it is no reason for this Court to grant review. Petitioners identify several pending actions in which the issues decided by the Fourth Circuit in this case are squarely before district courts in different circuits. To date, two of these courts have issued interlocutory orders ruling on the issue here. *United*

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[38] EPA explained: "We believe it is desirable to change the approach to major NSR. The current approach discourages sources from replacing components, and encourages them to replace components with inferior components or to artificially constrain production in other ways. This behavior does not advance the central policy goals of the major NSR program as applied to existing sources. ... We also do not believe the outcomes produced by the approach we have been taking [*i.e.*, the interpretation reflected in the enforcement initiative] have significant environmental benefits compared with the approach we are proposing today." 70 Fed. Reg. at 61,094.

*States. v. Ala. Power Co.*, 372 F.Supp.2d 1283 (N.D. Ala. 2005), followed *Duke Energy*, adopting EPA's contemporaneous interpretation of the 1980 PSD rules. *United States v. Cinergy* reached a contrary conclusion and adopted EPA's new actual-to-projected-actual test. The Seventh Circuit recently granted Cinergy's motion for interlocutory appeal. 384 F.Supp.2d 1272, 1274 (S.D. Ind. 2005), *appeal docketed*, No. 06-8029 (7th Cir. Jan. 3, 2006). Accordingly, the issue addressed by the Fourth Circuit is percolating in the different circuits, though there is currently no conflict among them. For this reason alone, even if Petitioners were correct that the issue the Fourth Circuit decided is a "recurring" one, this fact counsels *against* Supreme Court review in the context of this case. *See, e.g., Brown v. Texas*, 522 U.S. 940 (1997) ("the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals to serve as laboratories in which the issue receives further study before it is addressed by this Court") (internal quotation and citation omitted).

## III. THE FOURTH CIRCUIT DECISION TO REJECT EPA'S ENFORCEMENT INTERPRETATION OF THE 1980 RULES AND AFFIRM INSTEAD THE DISTRICT COURT'S APPLICATION OF EPA'S CONTEMPORANEOUS INTERPRETATION OF THESE RULES PRESENTS NO CONFLICT AND WAS WITHIN THE COURT'S JURISDICTION.

Petitioners argue at length that the Fourth Circuit exceeded its jurisdiction by "invalidat[ing]" the 1980 PSD rules. Pet. at 13. This argument is based on a false premise. The court did *not* invalidate the rules. While 42 U.S.C. §7607(b) provides that challenges to nationally applicable CAA rules may only be brought in the D.C. Circuit, the enforcement action brought by EPA against Duke Energy did not involve a challenge to any rule. Rather, at issue was the permissibility of the interpretation of the 1980 PSD rules on which EPA based its claims of liability in a case brought in the Middle District of

North Carolina, an issue that, on appeal, may be resolved *only* in the Fourth Circuit. 42 U.S.C. §7413(b); 28 U.S.C. §1291.

The district court and the Fourth Circuit had before them three different interpretations of "actual emissions increase" under the PSD rules. These interpretations had each been advanced by EPA previously. *See supra* 8-12 & n.26. Of these interpretations, the Fourth Circuit, like the district court, upheld the "actual-to-actual" interpretation, the interpretation that EPA had announced almost contemporaneously with its promulgation of 1980 PSD rules. The court explained: "Our choice of this interpretation of the PSD regulations—as required by statute—over the EPA's interpretation is not an invalidation of those regulations. The PSD regulations remain fully intact and enforceable" under EPA's contemporaneous interpretation, which is fully consistent with the statute. Pet. App. 15a n.7. Petitioners have presented no compelling reasons for certiorari.

First, Petitioners half-heartedly suggest a conflict, citing myriad cases for the proposition that the court's decision here is "an abrupt departure" from other courts of appeals that "have held that contentions that CAA regulations are contrary to statute are cognizable in the D.C. Circuit, and are barred from enforcement proceedings," Pet. at 14 & n.7, n.8. These cases are inapposite. The vast majority of these cases did not involve an agency's *interpretation* of the rule, as was the case here.[39] None held an agency's interpretation of its rule is

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[39] In their zeal to locate decisions from multiple circuits that purportedly support their contention, Petitioners cite cases that are hardly relevant to the issue here. *Enviro Tech Int'l, Inc. v. EPA*, 371 F.3d 370 (7th Cir. 2004), was a FOIA case, involving no challenge to any rule or its interpretation. Several cases involved untimely, collateral attacks on permits or final agency action, not a regulation or its interpretation. *See Chemical Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1492 (10th Cir. 1997) (collateral attack on RCRA permit); *Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1445 (9th Cir. 1984) (untimely challenge to PSD permit); *Pan Am. Grain Mfg. Co., v. EPA*, 95 F.3d 101, 103 (1st Cir. 1996) (untimely challenge to nonattainment designation); *Greenpeace, Inc. v. Waste Tech. Indus.*, 9 F.3d 1174, 1180 (6th Cir. 1993)

reviewable only in the D.C. Circuit.[40] Petitioners fail to cite the *only* other circuit decision that generally presents facts similar to this case. That decision reached the *same* conclusion as the Fourth Circuit below. *See League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1190 n.8 (9th Cir. 2002) (stating, in response to an argument similar to Petitioners' here, "we do not invalidate the regulation. Rather, we reject the [agency's] interpretation of the regulation and give it a construction consistent with its administrative history, case law, and the governing statute"); *id.* at 1190 ("An agency simply may not interpret a regulation in a way that contravenes a statute.").

For the same reason, the Fourth Circuit's decision here is not in "tension," much less conflict, with this Court's decision in *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), where the Court looked at the rule itself and held that rule altogether outside the ambit of §7607(b). No claim that

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(collateral attack on RCRA permit). Two cases involved direct attacks on the validity of regulations and merely recognized, as did the Fourth Circuit here, Pet. App. 15a n.7, that such attacks must be addressed to the D.C. Circuit. *See United States v. Kung-Shou Ho*, 311 F.3d 589, 607-08 (5th Cir. 2002) (refusing to entertain a defendant's procedural challenge to a regulation); *United States v. Walsh*, 8 F.3d 659, 664 (9th Cir. 1993) (noting that defendant challenged the rules themselves *and* the limitation on review set forth in 42 U.S.C. §7607(b)). Petitioners even misquote one case, claiming that *Siegelman v. EPA*, 911 F.2d 499 (11th Cir. 1990), stands for the proposition that a "claim that 'EPA's regulation conflicts with an act of Congress' may not be entertained in enforcement proceeding." Pet. at 14 n.7. That case in fact says the opposite: "we do have the jurisdiction to consider the argument that EPA's regulation conflicts with an act of Congress," *Id.* at 502 n.6.

[40] Petitioners cite only one case involving a challenge to an agency's interpretation of the rules. While Petitioners cite that court's unremarkable footnote noting the company in that case did not challenge the validity of the NSPS rules and that the court, in that event, would not have had jurisdiction to entertain such a challenge, *see WEPCo*, 893 F.2d at 914 n.6, they fail to note that defendant in that case challenged the interpretation of the 1980 PSD rules that EPA sought to apply and the court set it aside. *See id.* at 918 (rejecting EPA's "actual-to-potential" interpretation).

the 1980 rules are not subject to §7607(b) has been made here.

Second, Petitioners' attack on the court's construction of the 1980 rules in the course of their ostensible argument based on §7607(b) reveals that argument for what it is: not a jurisdictional argument, but merely a disagreement with the Fourth Circuit's decision on the merits. The fundamental premise of Petitioners' argument is found in a footnote: that the district court's construction of the rules that the Fourth Circuit affirmed is inconsistent with the rules' language. Pet. at 17 n.9. According to Petitioners, the court effectively invalidated the rules because they *cannot* be read consistently with NSPS, which "targets 'emissions rates' measured in kilogram per hour whereas the PSD regulations address 'actual emissions' in 'tons per year.'" Pet. at 18.

Contrary to Petitioners' contention, the Fourth Circuit did not construe the 1980 rules as mandating a maximum hourly emissions rate test to the exclusion of an annual emissions test. *See* Pet. at 19. The court affirmed the district court's (and EPA's contemporaneous) construction, which explicitly held that to be a PSD "modification," "Duke['s] projects [must] cause[] an increase in *annual* net emissions, assuming constant hours and conditions." Pet. App. 83a (emphasis added); *see WEPCo*, 893 F.2d at 918 n.14. Thus, an annual net emissions increase can result only from an increase in the hourly emissions rate, Pet. App. 58a-59a, and only NSPS "modifications" can be also PSD "modifications." This construction is required by the statute, as the Fourth Circuit held. It is also consistent with the plain language of the rules and the *WEPCo* remand instructions. *See id.* at 58a-60a, 67a-69a.

Regardless, that Petitioners disagree with the court below on the merits is no reason for this Court to grant review, for the reasons discussed earlier in Parts I and II.

Third, Petitioners are simply wrong on the merits. That the Fourth Circuit relied primarily on the statute for its rejection of EPA's (and Petitioners') interpretation of the 1980 rules in favor of EPA's own contemporaneous interpretation of these rules does not turn the court's ruling into an "invalidation" of

the rules. Rather, it is a straightforward application of this Court's "often stated" admonition that deference is due to an agency's regulatory interpretation that is not plainly erroneous or inconsistent with the rules "*provided* [that interpretation] does not violate the Constitution or a *federal statute*." *Stinson v. United States*, 508 U.S. 38, 45 (1993) (emphasis added). The Fourth Circuit, faced with multiple EPA interpretations of the 1980 PSD rules, thus recognized that the first step in discharging its duty in this case – *i.e.*, determining which EPA interpretation might command the deference that this Court's decisions require – is to determine which of these interpretations is consistent with the statute.[41] *See* Pet. App. 10a-11a. The court correctly deemed it unnecessary to proceed beyond that first step when it determined that only one of EPA's interpretations—the contemporaneous interpretation upheld by the district court—is consistent with the statute.[42]

In short, the court's review of EPA's enforcement interpretation falls squarely within its jurisdiction. Whereas the D.C. Circuit has jurisdiction to review the validity of nationally applicable CAA rules, the Fourth Circuit has jurisdiction to review the validity of regulatory interpretations that EPA asserts in actions arising in the Fourth Circuit.[43]

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[41] Both EPA and Petitioners "expressly acknowledge[d] ... these principles" in their briefs below, and EPA conceded that "the critical first 'question at issue'" was the consistency of its interpretation of the regulation with the statute. Pet. App. 10a-11a. It was not until the court requested supplemental briefing that the Plaintiffs claimed that answering that "critical first question" somehow violates 42 U.S.C. §7607(b).

[42] The district court also relied on the statute, *see* Pet. App. 63a-64a (citing *Stinson*), but went on to explain EPA's enforcement interpretation of the 1980 rules was inconsistent with their plain language, *id.* at 58a-60a.

[43] *See United States v. Ohio Department of Highway Safety*, 635 F.2d 1195, 1197 n.2 (6th Cir. 1980) ("[The rule] was not challenged by a petition for review. Thus, we treat it as a lawful regulation and are concerned only with the proper interpretation of the regulation ...."); *see also PEPCo v. EPA*, 650 F.2d 509, 513 (4th Cir. 1981) ("This court ... has jurisdiction to review only the EPA's interpretation of those regulations ...."); *Forsgren*, 309 F.3d at 1190 n.8.

Finally, Petitioners' statement that "authoritative" interpretations of the regulation are subject to §7607(b)(2) is wide off the mark. First, if Petitioners' argument is correct, no district court would have any authority to engage in any review of the agency's interpretation for that case; the court must simply take the agency's litigation position at face value – even if that interpretation is plainly inconsistent with the regulatory language – and mechanically apply it to the case at hand. That is not, and never has been, the law.

Second, *what is* EPA's "authoritative" interpretation of the 1980 PSD rules? Petitioners ignore EPA's contemporaneous interpretation and blithely assert EPA's "formal" interpretation was announced, and upheld, in the *WEPCo* matter. Pet. at 7-8. In fact, the "actual-to-potential" interpretation that EPA advanced in WEPCo was *rejected* by the Seventh Circuit and was acknowledged by EPA itself as impermissible in 1992. *Supra* 10-11 & n.22. Moreover, the "locally applicable" final agency action that was reviewed, and set aside, in *WEPCo* was EPA's PSD applicability determination in that case.

Section 7607(b) requires prompt challenges to nationally applicable CAA rules in the D.C. Circuit and other final actions in the regional circuits. It does not provide a means for EPA to promulgate ambiguous rules, change its interpretations at will, and claim that whatever interpretation it chooses to apply in a given enforcement case is immune from review.

As the Fourth Circuit explained, it scrupulously followed the requirements of the CAA, reviewing the interpretations presented to it by the parties and *not* the validity of the rules. Pet. App. 15a n.7. This is a straightforward application of the statute. Certiorari is not warranted.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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